

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1263

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MICHAEL YODER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

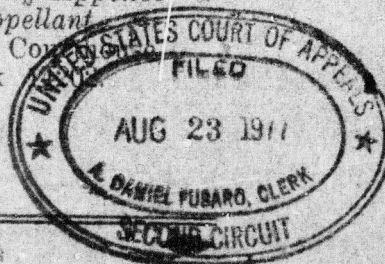
DANIEL YODER,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**BRIEFS FOR PLAINTIFF-APPELLEE
AND PLAINTIFF-APPELLANT**

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Preliminary Statement

Defendants Daniel and Michael Yoder were indicted along with a third co-defendant, Brian Buchanan,¹ on November 17, 1976. The Indictment alleged two counts of violations of 18 U.S.C., Section 2113(a), and Section 2, and a third count for a violation of 18 U.S.C., Section 2113(b) and Section 2. All counts arose out of the robbery of a bank in Strykersville, New York on October 20, 1976.

Following various motions to suppress, a suppression hearing was held before the District Court on January 3, 7, 18 and 19, and at the conclusion of the hearing it was determined that briefs would be submitted by the parties on the respective issues, and that the Court would have oral argument on Monday, January 31, 1977. At the time of oral argument, the Government was not represented due to incredibly bad (and highly publicized) weather conditions in the Buffalo area, although the District Judge entertained argument by the defendants' attorneys.² After hearing argument, Judge Elfvin denied the motions to suppress as to the defendants Brian Buchanan and Michael Yoder; Judge Elfvin granted the motion to suppress with respect to the defendant Daniel Yoder.

The progress of the cases of Daniel Yoder and Michael Yoder split at this point. On March 28, 1977 Michael Yoder

¹ On March 21, 1977, defendant Brian Buchanan entered a plea of guilty to 18 U.S.C., Section 2113(a) and Section 2, and has been sentenced to the custody of the Attorney General for a period of eight years. He has chosen not to appeal.

² See Affidavit of the Government Attorney, Government's Appendix p. 215. It should also be noted that two of the attorneys for the defendants made their way to the U.S. Courthouse on cross-country skis.

V.

entered a plea of guilty to count 2 of the Indictment (charging a violation of 18 U.S.C., Section 2113(b) and Section 2), specifically reserving his right to appeal the Judge's denial of his motion to suppress. Pursuant to the provisions of 18 U.S.C., Section 5010(c) Michael Yoder was sentenced to the custody of the Attorney General for a period of 8 years, and he is presently serving that sentence. Michael Yoder now appeals to this Court from the Judge's denial of his motion to suppress.³

With respect to Daniel Yoder, on February 23, 1977 the Government made a motion for rehearing and reargument on the Court's decision to suppress evidence, or in the alternative for an order setting forth the essential findings of facts and law supporting the Court's decision to suppress the evidence as required by Federal Rules of Criminal Procedure 12(e).

³ Michael Yoder's brief tends to gloss over a potential difficulty with the timing of the filing of his notice of appeal, an issue recognized by Judge Elfvin on several occasions (223, 235, and 237). Although the Government treated the judge's decision on the respective motions to suppress as occurring on January 31, 1977, when announced to the attorneys by phone, on the Government's motion the court filed a written memorandum and order on June 17, 1977. This, however, was well after Michael Yoder's sentence on March 28, 1977 and the filing of the court's judgment on March 30, 1977. Michael Yoder's notice of appeal was not filed until May 19, 1977, with no apparent reason advanced to justify the seven week delay. It is not clear why counsel would continue in a "confused" state (see transcript of attorney's letter set forth in Judge Elfvin's memorandum. 240. This memorandum deals exclusively with this issue.), without simply filing a notice of appeal. This is especially true considering counsel's knowledge that the Government had asked for reargument only in the companion case of Daniel Yoder.

The Government recognizes its position as an advocate and does not wish to ignore this issue; it is also the Government's position that a jailed defendant might have some complaint before this court regarding such an error by assigned counsel. For this reason, it is felt the jurisdiction of this appeal in the Michael Yoder case is a question best left to this court.

VI.

The Government also filed a Notice of Appeal of Judge Elfvin's decision suppressing the evidence. Because the motion for rehearing and the Appeal would cause a practical conflict, it was stipulated that the Government's Appeal be withdrawn, without prejudice to refile the Notice of Appeal following the District Court's decision to reconsider its order suppressing the evidence. Several months later, on June 17, 1977, Judge Elfvin filed a Memorandum and Order setting forth his findings, and again granting the defendant Daniel Yoder's Motion to Suppress. On June 23, 1977 the Government refiled a Notice of Appeal, and it is this Notice of Appeal which brings the case before this Court now.

Because the issues involving Daniel Yoder and Michael Yoder are essentially separate, the Government has chosen to prepare this one Preliminary Statement setting forth the chronology of the case, but has divided its brief into two separate parts, the first relating to the Government's response to Michael Yoder's appeal, and the second relating to the Government's appeal involving Daniel Yoder.

IN THE
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No. 77-1263

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL YODER,

Defendant-Appellant.

BRIEF OF APPELLEE

Statement of Facts

On November 7, 1976, Michael Yoder, who had been developed as a suspect in the Strykersville bank robbery, telephoned the Buffalo Office of the FBI and spoke with Special Agent Thomas Gray, (Government's Appendix pp. 13, 14. Hereinafter all references are to the Government's Appendix). Agent Gray told Michael Yoder that he had been looking for him; Agent Gray, however, also informed Michael Yoder that there was no warrant for his arrest and that he didn't have to come in. Michael Yoder, nevertheless, voluntarily came to the FBI office on November 11th and was interviewed (175). Special Agents Poerstal and Gray were present, and Michael Yoder was advised that the purpose of the interview was to discuss the bank robbery. The defendant had read to him and himself read the "Interrogation: Advice

of Rights" form, which he understood (15, 16, 192, 193). Michael Yoder then requested that an attorney be appointed, Agent Gray telling him that an attorney could not be appointed until he had been formally charged (16, 193). Michael Yoder then signed the rights form, and proceeded to give an oral statement as to how the robbery occurred which statement then was typed, reviewed by him and signed (16 to 19, and 192 to 196). Michael Yoder at that time gave another shorter statement which was taken down in longhand by Agent Gray and signed by the defendant. [This statement identified Bucharan as one of the two other men who had participated with Michael Yoder in the bank robbery (18 to 20, 196 to 200)]. As for the robbery proceeds, Michael Yoder promised to bring what was left of his share to the FBI office the next day, November 12th, but did not; he left after the interview (20, 201).

On November 18th, the day after the indictment came down against Michael Yoder, he again voluntarily appeared at the FBI office and was placed under arrest. He was again advised of his rights and again he read and signed the advice and waiver form (24, 30 to 32, 181 to 183, 204 to 205). Michael Yoder was asked by Agent Gray about the location of the robbery proceeds and then agreed that he would produce the same after he had been brought before the Magistrate (32, 206, 207). Less than an hour and a half after being arrested, Michael Yoder appeared before the Magistrate and was allowed to go free after executing a \$5,000 personal recognizance bond. The arraignment on the indictment, however, was not completed until the following day, when the appointed counsel appeared (1 to 7). After bail had been set, Michael Yoder directed Special Agent Neil Heiner to the place where the balance of his share of the money was located (114 to 118, 208 to 209).

Issues Presented

I. Whether an unindicted suspect is entitled to *Miranda* protections at an interview which he requests with the FBI.

II. Whether the right to counsel, if present, may be waived.

III. Whether an indicted defendant may waive the right to counsel and provide admissible evidence when he voluntarily appears at the FBI office to surrender.

ARGUMENT

Michael Yoder encountered the FBI twice: The first occurred approximately one week before he was indicted, when he heard the FBI was looking for him, at which time he made an appointment with Agent Gray and voluntarily appeared at the FBI office to discuss his participation in the bank robbery being investigated. The second encounter occurred at the FBI office the day after his indictment, where he surrendered. On both occasions Michael Yoder confessed to robbing the bank, and on the second occasion he led the agents to the hidden bank loot.

The Government's position is simply that on both occasions Michael Yoder voluntarily talked with FBI agents, and that whatever rights to counsel Michael Yoder had were knowingly, intelligently, and voluntarily waived.

Judge Elfvin's decision denying Michael Yoder's motion to suppress this evidence is a proper conclusion on the law and on the facts.

POINT I

Michael Yoder was not entitled to Miranda protections at his interview with the FBI on November 11, 1976.

At the time Michael Yoder appeared at the FBI office on November 11, 1976, six days before he was indicted, he was simply not entitled to any of the protections set forth in *Miranda*. Michael Yoder had on his own initiative phoned the FBI a few days earlier, and was told he was a suspect in the Strykersville bank robbery, but that there was no warrant and he had no obligation to visit the FBI office. However, he made an appointment with Special Agent Gray to visit the FBI office and discuss the robbery, and did in fact appear.

The resultant conversations cannot be considered a "custodial interrogation"; any argument by Michael Yoder that he was automatically entitled to the protections enumerated in *Miranda* must be rejected. *Oregon v. Mathiason*, U.S., 97 S.Ct. 711 (1977).

Michael Yoder appears to argue that the fact that Special Agent Gray advised him of *Miranda* rights off a routine FBI form (clearly a legitimate exercise of caution by the interviewing agent) somehow triggers greater constitutional safeguards than the Supreme Court has extended to such situations. It is almost as if Michael Yoder would suggest the agent should *not* have offered him the opportunity to remain silent or consult with an attorney. Defendant's suggestion that reading a suspect certain information off an FBI form, in a non-custodial situation where the suspect requests a meeting with FBI agents, somehow entitles him to assigned legal coun-

sel, is a proposition so far beyond the present state of our law as to be virtually ludicrous.

To defendant's argument that the interview should have ceased once Michael Yoder inquired about an attorney, it must clearly be recognized that if a suspect is not entitled to certain safeguards, the police are under no obligation to suspend an interview in order to honor such non-existent rights. Furthermore, defendant's argument is based entirely on the premise of a "custodial interrogation"; it is pointed out that Judge Elfvin made a specific finding, well supported by the record, that Michael Yoder's appearance on November 11, 1976 was not "custodial" (230, 231).

POINT II

The right to counsel, if present, may be waived.

In addition to the unique position that new constitutional rights were available to him at his interview with the FBI on November 11, 1976, Michael Yoder further argues that he did not—indeed could not—waive any rights he had. The record, and Judge Elfvin's findings of fact, render this position wholly without merit. The District Court recognized that Michael Yoder read, understood, and signed a waiver of rights form (226, 229). The judge correctly concludes that the agent's response to his inquiry about an attorney was proper (229). See *Kirby v. Illinois*, 406 U.S. 682 (1972).

And it remains a well established principle in this Circuit that a subject can waive the right to counsel. *United States v. Barone*, 467 F.2d 247 (2nd Cir. 1972).

POINT III

On November 18, 1976, the day after indictment, Michael Yoder voluntarily waived his right to counsel and provided admissible evidence to FBI agents.

The day after being indicted Michael Yoder voluntarily appeared at the FBI office to surrender. After making sure he was advised of his rights, Agent Gray discussed with Michael Yoder the location of his share of the bank loot, and the defendant agreed to take the agents to where the money had been hidden. (This offer was completed, and a quantity of money was recovered).

Without question, once indicted and arrested Michael Yoder was entitled to counsel. But as earlier mentioned, the law clearly allows for a defendant to voluntarily waive his right to counsel, and this is precisely what Judge Elfvin found occurred:

As to the post-indictment and post-arrest statements of Michael Yoder, I find that the statements as to the location of the robbery proceeds were voluntary and that the signing of the advice and waiver form meets the requirements for a waiver of the right to counsel under the Sixth Amendment. I hereby deny his motion to suppress such statements (234).

There being a voluntary waiver of this right, the defendant cannot now complain that the resultant evidence should have been suppressed.

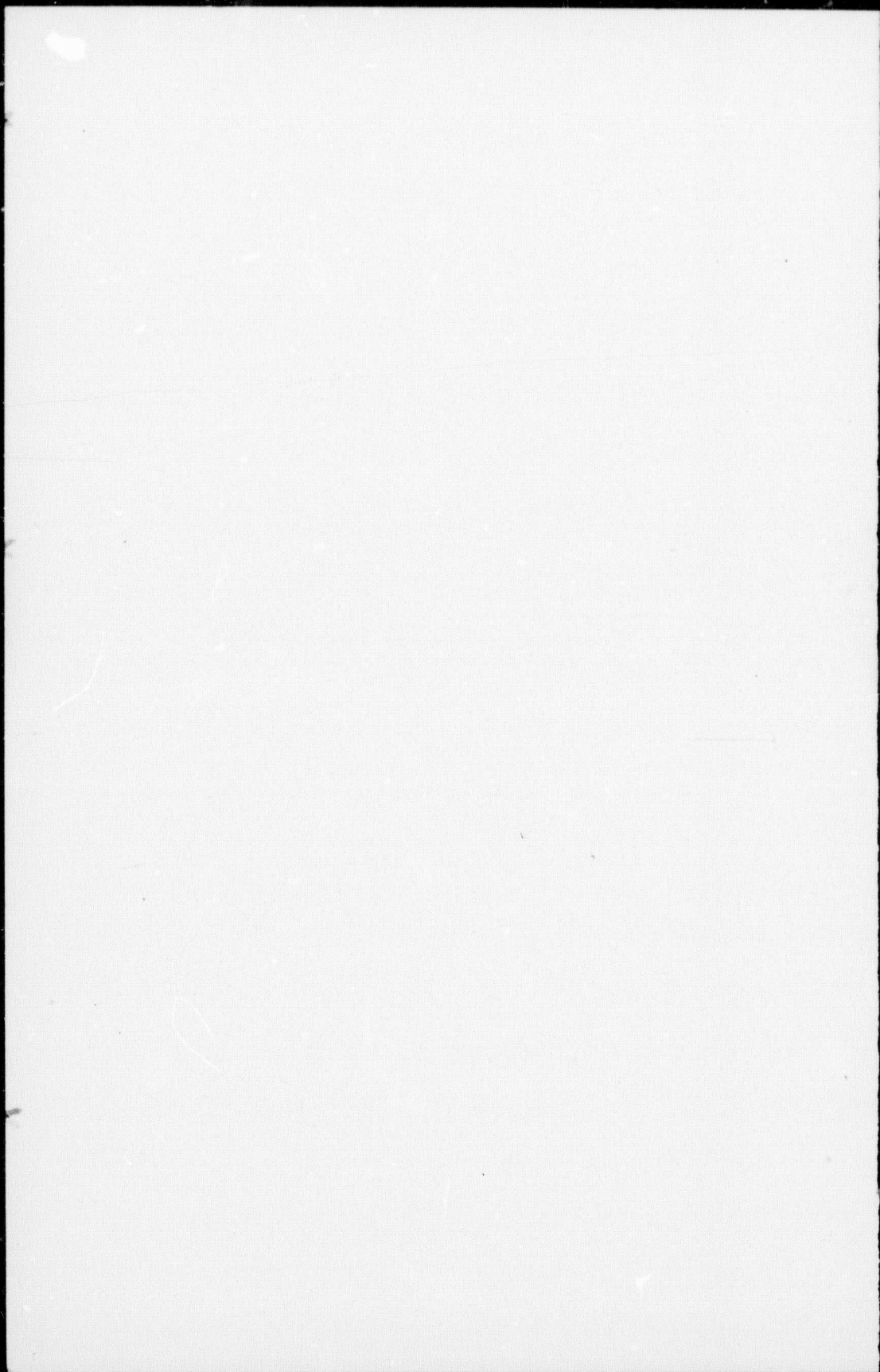
Conclusion

For the foregoing reasons, Judge Elfvin's decision denying Michael Yoder's motion to suppress should in all respects be affirmed.

Respectfully submitted,

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In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant.

vs.

DANIEL YODER,
Defendant-Appellee.

BRIEF OF APPELLANT
Statement of Facts¹

Daniel Yoder was first approached by FBI agents on November 18, 1976, the day following his indictment, at his apartment in Sardinia, New York. At the time of his arrest, Daniel Yoder was advised by Special Agent Thomas Gray that he was being arrested for the robbery of the Wyoming County Bank of Strykersville on October 20, 1976. (Government's Appendix pp. 21-23, 162. Hereinafter all references are to the Government's Appendix.) Daniel Yoder was removed to an FBI automobile, where he was fully advised of his *Miranda* rights (85, 145), which he indicated he understood (151, 158).

¹ The Government has had difficulty in compiling this statement of facts, since portions of Judge Elfvin's decision (5 to 6) are ambiguous as to whether he is merely summarizing conflicting testimony or making actual findings of facts. In any event, wherever possible the Government is treating his summarization of the testimony as his findings of fact.

Special Agent Gray met the defendant and agents Thomas Langer and Neil Heiner in the vehicle, and after another reference to the defendant's *Miranda* rights Daniel Yoder was asked if he wanted to make a statement to the agent, the defendant responding that he did not (23, 85, 147). Shortly thereafter, Special Agents Langer and Charles Patrick drove Daniel Yoder to the Buffalo FBI office for routine processing prior to his appearance before the United States Magistrate.²

At the FBI office, Daniel Yoder was permitted to call his father (102, 137) and was again advised of his *Miranda* rights by Special Agent Gray. Daniel Yoder was given an advice and waiver form, he read it and acknowledged that he understood it, but refused to sign it (25, 151, 262). He then requested an attorney, and was told that an attorney would be appointed when he was brought before the Magistrate.³

² The practice in the Western District of New York is for arraignments to be handled by the United States Magistrate.

³ Concerning Daniel Yoder's inquiries about an attorney being appointed for him, Agent Gray testified:

Q. (by AUSA Wagner): Do you recall if Daniel Yoder asked you for an attorney at the time?

A. (by Special Agent Gray): He inquired about—I believe he inquired about an attorney being appointed for him.

Q. What did you tell him, as best you recollect?

A. I explained to him that we did not appoint the attorneys, but the court system could appoint an attorney for him if he qualified for it, if he could not afford one himself. Let's see—I believe that is it essentially.

Q. Did you tell Mr. Yoder, if you recall, that he did not have to talk to you at that time?

A. Yes, I told him that he did not have to answer any questions.

Q. What did he say to that comment by you, if anything?

A. Well, he said he would tell me about the bank robbery. (26)

According to Agent Gray, the defendant then gave an oral confession as to his involvement in the bank robbery (28). When testifying at the suppression hearing, the defendant admitted that he had been advised of his rights and understood them (151, 161) but denied giving any oral statement to Agent Gray concerning his involvement in the robbery (169). He did, however, admit that *prior to* his appearance before Magistrate Maxwell he agreed to take the agents to the bank robbery money (163). He was then taken before the Magistrate, who again warned him that he is "not required to make any statement . . ." (2) and informed him that an attorney would be appointed the following day. Upon leaving the Magistrate's Court, Daniel Yoder directed Agent Gray to the stolen bank money, and by his own admission at the suppression hearing also discussed some aspects of the robbery (166).

Issues Presented

I. Whether once an indicted defendant has requested an attorney, he may subsequently waive this right by consciously choosing to speak to FBI agents and provide evidence.

II. Whether once a defendant has been arraigned and is released on a personal recognizance bond, with counsel to be appointed the following morning, he may waive his right to counsel by voluntarily going through with a pre-arraignment offer to furnish evidence.

ARGUMENT

The Government is appealing Judge Elfvin's order suppressing both Daniel Yoder's confession to the bank robbery and the bank robbery loot recovered by FBI agents at Daniel Yoder's direction, and in his presence, following his arraignment before the U.S. Magistrate.

Essentially, it is argued that Judge Elfvin reached the wrong legal conclusions when he found the Government failed to show that Daniel Yoder's statements were voluntary. The Judge's memorandum finds:

1. Daniel Yoder was arrested at home by FBI agents on November 18, 1976, having been indicted the previous day.
2. He was almost immediately and properly advised of his Miranda rights, which he understood, although he refused to sign the advice and waiver form.
3. In the FBI car on his way to the FBI office for processing, he requested an attorney.
4. At the FBI office he was again properly advised of his rights, which he again understood, and again refused to sign a waiver form.
5. Daniel Yoder requested an attorney, and was told one would be appointed when he was brought before the Magistrate for arraignment.
6. He was *again* advised he need not talk, but because he feared high bail being set, and in order to put himself in a favorable position before the Magistrate, he confessed to his participation in the robbery and agreed to show the location of his share of the robbery loot.

Judge Elfvin makes *no* findings of coercion, intimidation, deceit, improper police practices, faulty advisement of rights, etc.

It is the Government's position that these facts show legitimate police conduct, which properly safeguarded a defendant's rights; the facts also lead to the inescapable conclusion that Daniel Yoder balanced his right to remain silent with his desire to appear cooperative before the Magistrate, and knowingly, willfully, and intelligently chose to give up his right to remain silent by his voluntary offer of evidence to the FBI.

POINT I

Once a defendant has requested an attorney, he may subsequently waive this right by consciously choosing to speak to FBI agents and provide evidence.

A. Daniel Yoder's confession was voluntary.

The District Court, applying an unspecified "higher standard" test to the facts of this case, found Daniel Yoder's statements involuntary. The standard for determining the voluntariness of a confession in this Circuit was aptly stated in *United States v. Ferrara*, 377 F.2d 16, 17 (2nd Cir., 1967), cert. denied 389 U.S. 908 (1967) as follows:

[T]he test of voluntariness [of a confession] is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials were such as to overbear [the defendant's] will to resist and to bring about a confession not freely self-determined . . . ' (citations omitted).

As to defendant's contention that he was induced with statements about recognizance bail in order to reveal the whereabouts of the money, recent decisions of this Court are dispositive. In *Ferrara, supra* at 18, a confession was held to be voluntary even though Federal agents had gone beyond simply urging the defendant to cooperate and had promised that he would be released on bail if he confessed. See also *United States v. Pomares*, 499 F.2d 1220 (2nd Cir. 1974) (defendant was told that he faced heavy penalties, that he was his own best lawyer, and that the wisest course of action would be to cooperate rather than exercise his right to remain silent). Similarly in *United States v. Nussen*, 531 F.2d 15 (2nd Cir. 1976), the court upheld the voluntariness of a confession after agents told the defendant they would make no promises but

would only inform the United States Attorney of his intention to cooperate.

Factors used in determining the voluntariness of a confession as codified under 18 U.S.C., Section 3501(b) include the delay in arraignment, knowledge by the defendant of the nature of the offense, advice as to the rights to remain silent and to assistance of counsel. In this case, the time between arrest and arraignment was approximately 3½ hours; defendant was informed as to the nature of the charge, and was informed of his rights which he understood. The circumstances here do not disclose any overbearing on the part of the FBI agents. There is no evidence that defendant was subjected to any threats, physical coercion, or protracted interrogation. *U.S. ex rel. Louis v. Henderson*, 526 F.2d 896, 901-902 (2nd Cir. 1975). Daniel Yoder's arrest, interview and arraignment were carried out in an expeditious fashion. His statement was not the product of intimidation or psychological pressure; rather it was the product of a deliberate and voluntary effort at self-help.

B. The decision in *United States v. Satterfield*,⁴ cited by the District Court as requiring suppression, should not control in this case.

Judge Elfvin found "that *Satterfield* as affirmed is controlling and requires the suppression of Daniel Yoder's statements . . ." (233). The *Satterfield* decision makes reference to a "higher standard" regarding waiver of one's Sixth Amendment right to counsel, as compared to one's waiver of an attorney under the Fifth Amendment. It is submitted that there is no authority in the Second Circuit for this proposition, and that the numerous decisions in this Circuit

⁴ Docket No. 76-1372, 2nd Cir., Dec. 7, 1976.

which the *Satterfield* Court "distinguishes" plainly support the Government's position.

At the time of his arrest, Daniel Yoder was unquestionably entitled to counsel under the Sixth Amendment. *Kirby v. Illinois*, 406 U.S. 682 (1972). This premise, however, is of no use in determining if and how that right may be waived. According to the District Court, following the *Satterfield* analysis, defendant's statements are inadmissible under *Massiah v. United States*, 377 U.S. 201 (1964). This Circuit has consistently applied *Massiah* to surreptitious, and thus unwaived interference with the right to counsel. In *United States v. Chong*, 544 F.2d 58 (2nd Cir. 1976), this court distinguished *Massiah*, noting that there was no surreptitious questioning of the defendant, nor was he subjected to interrogation during which his wish for counsel was denied. As in the instant case, those evils sought to be prevented by the *Massiah* decision were absent. In *United States v. Barone*, 467 F.2d 247 (2nd Cir. 1972), the Court admitted a statement taken following indictment and arrest, where the defendant waived his right to counsel. While in *Barone* the defendant executed a written waiver, the facts of the present case show an equally clear indication of the defendant's voluntary waiver of his right to have counsel present when he gave evidence to the agents. Indeed, his refusal to execute a written waiver as well as his testimony indicates that he fully understood his rights and in fact exercised discretion in asserting them. By his own words, he made a "conscious decision" to turn in the money when he did so (274, 277). Similarly, in *United States v. Diggs*, 497 F.2d 391 (2nd Cir. 1974), *cert. denied* 419 U.S. 861 (1974), the Court found a valid waiver of defendant's right to counsel following several warnings to the defendant of his *Miranda* rights. See also *United States v. Reed*, 526 F.2d 740 (2nd Cir. 1975), *cert.*

denied 424 U.S. 956 (1976); *United States v. Duvall*, 537 F.2d 15 (2nd Cir. 1976), *cert. denied* U.S., 96 S.Ct. 3173 (1976).

C. The facts of the *Satterfield* case are clearly distinguishable from the present case, providing an additional reason to reject that decision as controlling here.

The *Satterfield* decision implies that the panel accepted the District Court's finding that the defendant could not have waived his Sixth Amendment right to counsel because he was "distraught, upset, weeping and obviously out of control at the initial questioning, still in great need of help at the later interview." (Slip Op. at 808), apparently relying on the District Court's opinion dated July 8, 1976, 417 F.Supp 293 (S.D.N.Y. 1976). In fact, the District Court subsequently amended its opinion to specifically eliminate those findings of fact. 417 F.Supp 303 (S.D.N.Y. 1976). Thus, it remains unclear what the panel would have said had it interpreted the law based on the District Judge's amended findings of fact. It should also be noted that the Government's petition for a rehearing *en banc* of the *Satterfield* decision is still pending.

In any event, the Government contends that the facts of this particular case show a clear, conscious, and voluntary waiver of Daniel Yoder's right to have counsel present before giving any information to the agents. Special Agent Gray testified that after being advised that he need not talk, Daniel Yoder gave an oral confession as to his involvement in the bank robbery:

Q. (by AUSA Wagner): Can you tell us, Sir, if at any time Mr. Daniel Yoder did provide you with an oral statement concerning his involvement at the particular bank which is the subject of the indictment?

A. (by Special Agent Gray): Yes, he told me that he robbed the Strykersville office of the Wyoming County Bank, Route 78, Strykersville, New York on October 20, 1976.

Q. And that occurred after you advised him of his rights, as you earlier testified?

A. Yes. (28)

At the suppression hearing Daniel Yoder admitted that he had been advised of his rights and understood them (262, 272), and that *on his own initiative* he inquired of Special Agent Gray how he could help himself with the specific goal of avoiding jail:

Q. (by AUSA Wagner): What did he (Agent Gray) say to you about the money?

A. (by Daniel Yoder): I asked him how I could help myself—you know—let me think for a minute—

Q. You asked Mr. Gray how you could help yourself?

A. Yes.

Q. Did Mr. Gray give you an answer?

A. Yes, he said I could turn in money. (163)

By Daniel Yoder's own testimony he made a conscious, rational decision to provide evidence, well aware of his right to refuse to do so without counsel present:

Q. (by AUSA Wagner): And you then said, sir, that you asked—before you would give any statement you asked Mr. Gray some questions, and after you got certain answers, certain satisfactory answers, it was then you decided to talk to him?

A. (by Daniel Yoder): I didn't say I would talk to him then either, I told him I would turn in money.

Q. You did ask him first how you could help yourself?

A. How I could help myself not to be in jail waiting for trial.

Q. And you made sure that you asked those questions before you gave any further information, is that right?

A. I didn't give any information.

Q. At that time?

A. At that time.

Q. What did Mr. Gray tell you?

A. He told me it would probably be easier for me if I turned in money.

Q. Did Mr. Gray explain to you that it was not his decision, but the Magistrate's decision?

A. Yes.

Q. Did Mr. Gray say that any cooperation you provided would be brought to the attention of the prosecutors?

A. Yes.

Q. And they in turn would provide the Magistrate that information?

A. Yes.

Q. That could be a factor in the Magistrate's decision to release you?

A. Yes.

Q. And Mr. Gray, isn't it true, never told you that he was releasing you or that he would release you?

A. No, he didn't say that.

Q. You were aware that it was the Magistrate's decision?

A. Yes.

Q. And with that in mind, I take it, sir, you did not want to spend anytime in jail at that time?

A. Yes.

Q. And you agreed to provide Mr. Gray some information in that respect?

A. Yes.

Q. Was it your understanding, sir, that he would bring it to the attention of the prosecutors?

A. Yes.

Q. And that would be turned over to the Magistrate?

A. I was informed that would be his intention.

Q. In fact, Mr. Gray did bring it to the attention of the prosecutors, and it was brought to the attention of the Magistrate—

A. Yes.

Q. —at the time of your arraignment before him or appearance before him?

A. Yes.

Q. Now, Mr. Yoder, at that point you decided to provide some information to Mr. Gray—

A. Yes.

Q. —obviously?

A. Yes.

Q. You did in fact take Mr. Gray out to where the money was?

A. Yes.

Q. And you also discussed with Mr. Gray some aspects of the actual incident itself, did you not?

A. Not that I knew I was supplying him with information.

Q. Well, the question is you did talk to Mr. Gray about the incident?

A. Yes.

Q. You did open your mouth and words came out—

A. Yes.

Q. —about this particular bank robbery?

A. Yes.

Q. And that was after you had decided to talk to Mr. Gray about the money?

A. Yes. (163-166)

* * * * *

Q. How did the discussion concerning the helping of bail come about?

A. I asked him.

Q. What did you ask him specifically?

A. I asked him what I could do to help me get bail, you know, on my recognizance or something like that.

Q. What did he say, do you recall?

A. He told me it would help if I turned in the money, just like that.

Q. Did he say anything else to you?

A. Not that I can recall. (170)

D. Admissions of guilt are not prohibited by the United States Constitution.

Law enforcement officers have a duty to assemble all available evidence relating to the commission of a crime, "and this includes such information as a participant may be willing to give." *United States v. Pomares*, 499 F.2d 1220, 1222 (2d Cir. 1974). As the Supreme Court noted in *Michigan v. Mosley*, 423 U.S. 96 (1975), a blanket prohibition against the taking of voluntary statements would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States v. Washington*, U.S. (No. 74-1106, decided May 23, 1977, Slip. Op. at 6).

Thus, in the context of a thorough awareness of his rights to refuse questioning, and recognizing that he would be appearing before the United States Magistrate in a very short time where his request for an attorney would be properly acted upon, defendant, to present a favorable impression, agreed to give information about the money.

POINT II

A defendant who has been arraigned and is released on a personal recognizance bond with counsel to be appointed the following morning may waive his right to counsel by voluntarily going through with a pre-arraignment offer to furnish evidence.

A. Defendant's desire to appear cooperative for bail purposes in no manner undermines the voluntariness of his decision to furnish evidence in the absence of counsel.

In view of Magistrate Maxwell's readvisement of his rights, defendant's argument that his post-arraignment actions and statements were not volunteered is tenuous. Despite his claimed insistence that he wanted an attorney, defendant freely took the agents to the money at a time when he was neither subject to interrogation nor even in their custody. It is not required that a volunteered statement be interrupted for it to be found legally voluntary. *United States v. Gaynor*, 472 F.2d 899, 900 (2nd Cir. 1973).

B. In any event, defendant's non-custodial willingness to provide evidence should not be construed as a "fruit of poisonous tree."

At the arraignment, Daniel Yoder was readvised of his rights by the Magistrate and released from custody. Assuming for the purpose of this argument that Daniel Yoder's pre-arraignment statement was illegally obtained, the fact that he had been released on his own recognizance following a lawful arraignment, and had voluntarily directed agents to the fruits of the crime, renders the connection between his pre-arraignment statement and post-arraignment willingness to provide evidence "so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341 (1939); see *Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

Conclusion

For the foregoing reasons, Judge Elfvin's decision granting Daniel Yoder's motion to suppress should be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.

vs

Michael Yoder & Daniel Yoder

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1263

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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On the 22nd day of August, 19 77
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Leslie R. Johnson

Sworn to before me this

22nd day of August, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979